if in any portion they are not so constructed, or for any reason, it is not expected passengers will use them throughout their full extent, in all such rightful emergency as may seem to demand such use, they should take some positive and sensible means of securing their exclusion from the prohibited portion. Passengers will naturally take any open passage leading to the place which they design or desire to reach. And if any such passages remain open about passenger stations, which passengers, on any emergency, not produced by their own fault, will be likely to take, the company should be held responsible for the consequences until they take the precaution to fence off such passage. This is upon the same principle, that one who has an open well or any other dangerous place about his premises, is bound to fence it off, or he will be held responsible for any injury occuring to any person rightfully there. *Burnes* v. *Wade*, 2 Car. & K. 661. This general subject was largely discussed in a recent case in the House of Lords. *The Mersey Docks and Harbor Board* v. *Ruhallow*, Law Rep. 1 Ho. Lds. 93; S. C. 12 Jur. N. S. 571. So also as bearing upon the same question, *Metcalfe* v. *Hatherington*, 5 H. & N. 719; *Coe* v. *Wise*, 10 Jur. N. S. 1019.

I. F. R.

Supreme Court of the United States.

L. P. WOODRUFF *et al v.* JOHN PARHAM.

The provision of the National Constitution, that no state shall, without the consent of Congress, levy any imposts or duties on imports or exports, extends alone to articles brought into a state from a *foreign* country, and has no application to articles brought from one state into another; hence this provision does not prohibit a state from taxing articles brought into it for sale from a sister state, even though when taxed they are in the original or unbroken package.

A state law authorizing a tax on *all* sales of merchandise, whether the goods sold be the produce of that state or some other, and not discriminating against the products of sister states or their citizens, is valid, even though the articles were sold at wholesale in the original and unbroken packages.

Brown v. *Maryland*, 12 Wheat. 419, and other cases commented on and distinguished from the present case by MILLER, J.

In error to the Supreme Court of the State of Alabama.

The opinion of the Court was delivered by

MILLER, J.—The charter of Mobile authorizes that city to impose a tax for municipal purposes on real and personal estate, auction sales and sales of merchandise, capital employed in business, and income within the city. The plaintiff in error

having sold as auctioneer and commission merchant a large amount of goods for others, and also on his own account, claims that as to such goods as were brought into the State of Alabama from other states of the Union, and sold by him at wholesale in the original and unbroken packages, he is not liable to the tax which the ordinances of the city impose upon all sales of merchandise.

The case was heard in the courts of the State of Alabama upon an agreed statement of facts, and that statement fully raises the question, whether merchandise brought from other states and sold under the circumstances stated, comes within the prohibition of the Federal Constitution, that no state shall, without the consent of Congress, levy any imposts or duties on imports or exports. And it is claimed that it also brings the case within the principles laid down by this court in *Brown* v. *The State of Maryland*, 12 Wheaton 419.

That decision has been recognized for over forty years as governing the action of this court in the same class of cases, and its reasoning has been often cited and received with approbation in others to which it was applicable. We do not now propose to question its authority, or to depart from its principles.

The tax of the State of Maryland, which was the subject of controversy in that case, was limited by its terms to importers of foreign articles or commodities, and the proposition that we are now to consider is, whether the provision of the constitution to which we have referred extends, in its true meaning and intent, to articles brought from one state of the Union into another.

The subject of the relative rights and powers of the Federal and state governments in regard to taxation, always delicate, has acquired an importance by reason of the increased public burdens growing out of the recent war, which demands of all who may be called in the discharge of public duty to decide upon any of its various phases, that it shall be done with great care and deliberation. Happily for us, much the larger share of these responsibilities rests with the legislative departments of the state and Federal Governments. But when, under the

pressure of a taxation necessarily heavy, and in many cases new in its character, the parties affected by it resort to the courts to ascertain whether their individual rights have been infringed by legislation, and assert rights supposed to be guaranteed by the Federal Constitution, they, in every such case properly brought before us, devolve upon this court an obligation to decide the question raised from which there is no escape.

The words impost, imports, and exports, are frequently used in the constitution. They have a necessary correlation; and when we have a clear idea of what either word means in any particular connection in which it may be found, we have one of the most satisfactory tests of its definition in other parts of the same instrument.

In the case of *Brown* v. *Maryland*, the word imports, as used in the clause now under consideration, is defined, both on the authority of the lexicons and of usage, to be articles brought into the country; and impost is there said to be a duty, custom, or tax levied on articles brought into the country. In the ordinary use of these terms at this day, no one would, for a moment, think of them as having relation to any other articles than those brought from a country foreign to the United States, and at the time the case of *Brown* v. *Maryland* was decided—namely, in 1827—it is reasonable to suppose that the general usage was the same, and that in defining imports as articles brought into the country, the chief justice used the word country as a synonym for United States.

But the word is susceptible of being applied to articles introduced from one state into another, and we must inquire if it was so used by the framers of the constitution.

Leaving, then, for a moment, the clause of the constitution under consideration, we find the first use of any of these correlative terms in that clause of the eighth section of the first article which begins the enumeration of the powers confided to Congress.

"The Congress shall have power to levy and collect taxes, duties, imposts, and excises, * * but all duties, imposts, and excises shall be uniform throughout the United States."

Is the word impost, here used, intended to confer upon Con-

gress a distinct power to levy a tax upon all goods or merchandise carried from one state into another? Or is the power limited to duties on foreign imports? If the former be intended, then the power conferred is curiously rendered nugatory by the subsequent clause of the ninth section, which declares that no tax shall be laid on articles exported from any state, for no article can be imported from one state into another which is not, at the same time, exported from the former. But if we give to the word imposts, as used in the first mentioned clause, the definition of Chief Justice Marshall, and to the word export the corresponding idea of something carried out of the United States, we have, in the power to lay duties on imports from abroad, and the prohibition to lay such duties on exports to other countries, the power and its limitations concerning imposts.

It is also to be remembered that the convention was here giving the right to lay taxes by national authority in connection with paying the debts and providing for the common defence and general welfare, and it is a reasonable inference that they had in view, in the use of the word imports, those articles which, being introduced from other nations and diffused generally over the country for consumption, would contribute, in a common and general way, to the support of the National Government. If internal taxation should become necessary, it was provided for by the terms taxes and excises.

There are two provisions of the clause under which exemption from state taxation is claimed in this case, which are not without influence on that prohibition, namely: that any state may, with the assent of Congress, lay a tax on imports, and that the net produce of such tax shall be for the benefit of the treasury of the United States. The framers of the constitution, claiming for the general government, as they did, all the duties *on foreign* goods imported into the country, might well permit a state that wished to tax more heavily than Congress did, foreign liquors, tobacco, or other articles injurious to the community, or which interfered with their domestic policy, to do so, provided such tax met the approbation of Congress, and was paid into the Federal treasury. But that it was intended to permit

such a tax to be imposed by such authority on the products of neighboring states for the use of the Federal Government, and that Congress, under this temptation, was to arbitrate between the state which proposed to levy the tax and those which opposed it, seems altogether improbable.

Yet this must be the construction of the clause in question, if it has any reference to goods imported from one state into another.

If we turn for a moment from the consideration of the language of the constitution, to the history of its formation and adoption, we shall find additional reason to conclude that the words imports and imposts were used with exclusive reference to articles imported from foreign countries.

Section three, article six, of the Confederation, provided that no state should lay imposts or duties which might interfere with any stipulation in treaties entered into by the United States; and section one, article nine, that no treaty of commerce should be made whereby the legislative power of the respective states should be restrained from imposing such imposts and duties on foreigners as their own people were subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever. In these two articles of the Confederation, the words imports, exports, and imposts are used with exclusive reference to foreign trade, because they have regard only to the treaty-making power of the Federation.

As soon as peace was restored by the success of the revolution, and commerce began to revive, it became obvious that the most eligible mode of raising revenue for the support of the general government and the payment of its debts, was by duties on foreign merchandise imported into the country. The Congress accordingly recommended the states to levy a duty of five per cent. on all such imports, for the use of the Confederation. To this, Rhode Island, which, at that time, was one of the largest importing states, objected, and we have a full report of the remonstrance addressed by a committee of Congress to that state on that subject.—(1 Elliot's Debates 131–3.) And the discussions of the Congress of that day, as imperfectly as they have been preserved, are full of the subject of the injustice

done by the states who had good seaports, by duties levied in those ports on foreign goods designed for states who had no such ports.

In this state of public feeling in this matter, the constitutional convention assembled.

Its very first grant of power to the new government about to be established, was to lay and collect imposts or duties on foreign goods imported into the country, and among its restraints upon the states, was the corresponding one that *they* should lay no duties on imports or exports. It seems, however, from Mr. Madison's account of the debates, that while the necessity of vesting in Congress the power to levy duties on foreign goods was generally conceded, the right of the states to do so likewise was not given up without discussion, and was finally yielded with the qualification to which we have already referred, that the states might lay such duties with the assent of Congress. Mr. Madison moved that the words "nor lay imposts or duties on imports" be placed in that class of prohibitions which were absolute, instead of those which were dependent on the consent of Congress. His reason was that the states interested in this power (meaning those who had good seaports), by which they could tax the imports of their neighbors passing through their markets, were a majority, and could gain the consent of Congress to the injury of New Jersey, North Carolina, and other non-importing states. But his motion failed.—(5 Madison Papers 486.) In the convention of Virginia, called to adopt the constitution, that distinguished expounder and defender of the instrument, so largely the work of his own hand, argued, in support of the authority to lay direct taxes, that without this power a disproportion of burden would be imposed on the southern states, because, having fewer manufactures, they would consume more imports and pay more of the imposts.—(3 Elliot's Debates 248.) So, in defending the clause of the constitution now under our consideration, he says: "Some states export the produce of other states. Virginia exports the produce of North Carolina; Pennsylvania those of New Jersey and Delaware; and Rhode Island those of Connecticut and Massachusetts. The exporting states wished to retain the power of laying duties

on exports, to enable them to pay expenses incurred. The states whose produce was exported by other states, were extremely jealous lest a contribution should be raised of them by the exporting states, by laying heavy duties on their own commodities. If this clause be fully considered it will be found to be more consistent with justice and equity than any other practicable mode: for if the states had the exclusive imposition of duties on exports, they might raise a heavy contribution of the other states for their own exclusive emoluments." (2 Elliot's Debates 443–4). Similar observations from the same source are found in the forty-second number of the Federalist, but with more direct reference to the power to regulate commerce.

Gov. Elsworth, in opening the debate of the Connecticut convention on the adoption of the constitution, says: "Our being tributary to our sister states, in consequence of the want of a Federal system. The State of New York raises £60 or £80,000 in a year by impost. Connecticut consumes about one-third of the goods upon which this impost is laid, and consequently pays one-third of this sum to New York. If we import by the medium of Massachusetts, she has an impost, and to her we pay tribute."—(2 Elliot's Debates 192.) A few days later he says: "I find, on calculation, that a general impost of five per cent. would raise a sum of £245,000," and adds, "it is a strong argument in favor of an impost, that the collection of it will interfere less with the internal police of the states than any other species of taxation. It does not fill the country with revenue officers, but is confined to the sea-coast, and is chiefly a water operation. * * * If we do not give it to Congress, the individual states will have it."—(2 Elliot's Debates 196.)

It is not too much to say that, so far as our research has extended, neither the word export, import, or impost is to be found in the discussions on this subject, as they have come down to us from that time, in reference to any other than foreign commerce, without some special form of words to show that foreign commerce is not meant. The only allusion to imposts in the articles of confederation, is clearly limited to duties on goods imported from foreign states. Wherever we find the

grievance to be remedied by this provision of the constitution alluded to, the duties levied by the states on foreign importations is alone mentioned, and the advantages to accrue to Congress from the power confided to it, and withheld from the states, is always mentioned with exclusive reference to foreign trade.

Whether we look, then, to the terms of the clause of the constitution in question, or to its relation to the other parts of that instrument, or to the history of its formation and adoption, or to the comments of the eminent men who took part in these transactions, we are forced to the conclusion that no intention existed to prohibit, by *this clause*, the right of one state to tax articles brought into it from another. If we examine for a moment the results of an opposite doctrine, we shall be well satisfied with the wisdom of the constitution as thus construed.

The merchant of Chicago, who buys his goods in New York, and sells at wholesale in the original packages, may have his millions employed in trade for half a lifetime and escape all state, county and city taxes, for all that he is worth is invested in goods which he claims to be protected as imports from New York. Neither the state nor the city, which protects his life and property, can make him contribute a dollar to support its government, improve its thoroughfares, or educate its children. The merchant in a town in Massachusetts, who deals only in wholesale, if he purchase his goods in New York, is exempt from taxation. If his neighbor purchase in Boston, he must pay all the taxes which Massachusetts levies with equal justice on the property of all its citizens.

These cases are merely mentioned as illustrations. But it is obvious that if articles brought from one state into another are exempt from taxation, even under the limited circumstances laid down in the case of *Brown* v. *Maryland*, the grossest injustice must prevail, and equality of public burdens in all our large cities is impossible.

It is said, however, that, as a court, we are bound, by our former decisions, to a contrary doctrine, and we are referred to the cases of *Almy* v. *State of California*, 24 Howard 169, and *Brown* v. *Maryland*, 12 Wheaton 419, in support of the assertion.

The case first mentioned arose under a statute of California, which imposed a stamp tax on bills of lading for the transportation of gold and silver from any point within the state to any point without the state.

The master of the ship Ratler was fined for violating this law, by refusing to affix a stamp to a bill of lading for gold shipped on board his vessel from San Francisco to New York. It seems to have escaped the attention of counsel on both sides, and of the chief justice who delivered the opinion, that the case was one of inter-state commerce. No distinction of the kind is taken by counsel, none alluded to by the court, except in the incidental statement of the *termini* of the voyage. In the language of the court, citing *Brown* v. *Maryland* as governing the case, the statute of Maryland is described as a tax on foreign articles and commodities. The only question *discussed* by the court is, whether the bill of lading was so intimately connected with the articles of export described in it that a tax on it was a tax on the articles exported. And, in arguing this proposition, the chief justice says, that "a bill of lading, or some equivalent instrument of writing, is invariably associated with every cargo of merchandise exported to a *foreign country*, and consequently a duty upon that is, in substance and effect, a duty on the article exported." It is impossible to examine the opinion without perceiving that the mind of the writer was exclusively directed to foreign commerce, and there is no reason to suppose that the question which we have discussed was in his thought. We take it to be a sound principle, that no proposition of law can be said to be overruled by a court which was not in the mind of the court when the decision was made.—*The Victory* 6 Wall, 382.

The case, however, was well decided, on the ground taken by Mr. Blair, counsel for defendant, namely: that such a tax was a regulation of commerce, a tax imposed upon the transportation of goods from one state to another, over the high seas, and in conflict with that freedom of transit of goods and persons between one state and another, which is within the rule laid down in *Crandall* v. *Nevada*, 6 Wallace, 35, and with the authority of Congress to regulate commerce among the states.

We do not regard it, therefore, as opposing the views which we have announced in this case.

The case of *Brown* v. *Maryland,* as we have already said, arose out of a statute of that state, taxing, by way of discrimination, importers who sold by wholesale foreign goods.

And Chief Justice MARSHALL, in delivering the opinion of the court, distinctly bases the invalidity of the statute—(1) On the clause of the constitution which forbids a state to levy imposts or duties on imports; and (2) That which confers on Congress the power to regulate commerce with foreign nations, among the states, and with the Indian tribes.

The casual remark, therefore, made in the close of the opinion, "that we suppose the principles laid down in this case to apply equally to importations from a sister state," can only be received as an intimation of what they might decide if the case ever came before them, for no such case was then to be decided. It is not, therefore, a judicial decision of the question, even if the remark was intended to apply to the first of the grounds on which that decision was placed.

But the opinion in that case discusses, as we have said, under two distinct heads, the two clauses of the constitution which he supposed to be violated by the Maryland statute, and the remark above quoted follows immediately the discussion of the second proposition, or the applicability of the commerce clause to that case.

If the court then meant to say that a tax levied on goods from a sister state which was not levied on goods of a similar character produced within the state, would be in conflict with the clause of the constitution giving Congress the right "to regulate commerce among the states," as much as the tax on foreign goods, then under consideration, was in conflict with the authority "to regulate commerce with foreign nations," then we agree to the proposition.

It may not be inappropriate here to refer to the license cases (5 Howard, 504).

The separate and diverse opinions delivered by the judges on that occasion leave it very doubtful if any material proposition was decided, though the precise point we have here argued was

before the court and seemed to require solution. But no one can read the opinions which were delivered without perceiving that none of them held that goods imported from one state into another are within the prohibition to the states to levy taxes on imports, and the language of the chief justice and Judge McLean leave no doubt that their views were adverse to the proposition.

We are satisfied that the question, as a distinct proposition necessary to be decided, is before us now for the first time.

But, we may be asked, is there no limit to the power of the states to tax the produce of their sister states brought within their borders? And can they so tax them as to drive them out or altogether prevent their introduction or their transit over their territory?

The case before us is a simple tax on sales of merchandise, imposed alike upon all sales made in Mobile, whether the sales be made by a citizen of Alabama or of another state, and whether the goods sold are the produce of that state or some other. There is no attempt to discriminate injuriously against the products of other states or the rights of their citizens, and the case is not, therefore, an attempt to fetter commerce among the states, or to deprive the citizens of other states of any privilege or immunity possessed by citizens of Alabama. But a law having such operation would, in our opinion, be an infringement of the provisions of the constitution which relate to those subjects, and therefore void. There is also, in addition to the restraints which those provisions impose by their own force on the states, the unquestioned power of Congress, under the authority to regulate commerce among the states, to interpose, by the exercise of this power, in such a manner as to prevent the states from any oppressive interference with the free interchange of commodities by the citizens of one state with those of another.

The judgment of the Supreme Court of Alabama is affirmed.